Ngai Tahu Sea Fisheries Report

04 Ngai Tahu Sea Fisheries Treaty Rights at 1840

4.1 Introduction

4. NGAI TAHU SEA FISHERIES TREATY RIGHTS AT 1840
4.1. Introduction

In the previous chapter we have described how the bounty of Tangaroa provided in abundance for Ngai Tahu. There were infinitely more fish in the seas adjacent to their shores than Ngai Tahu required for their daily needs. They took all they needed and in the late 1830s were supplying visiting ships and it seems Sydney traders with fish. The rest they left to multiply.

In this chapter we consider the provision made in the Treaty of Waitangi to protect Maori sea fisheries. In doing so we largely adopt the discussion of this topic in chapter 10 of the Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim 1988. We then state our findings on the nature and extent of Ngai Tahu sea fishing Treaty rights at 1840 in the light of our conclusions on the evidence discussed in chapter 3.

Waitangi Tribunal, Department of Justice, Wellington.

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4.2 The Words of the Treaty

4.2. The Words of the Treaty

English text

4.2.1 Article 2 of the English text begins:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess ...

That Maori may keep or part with those properties they possessed is emphasised in the clause that follows:

so long as it is their wish and desire to retain the same in their possession.

The article then grants to the Crown an exclusive right of pre-emption in respect of lands.

Maori text

4.2.2 To facilitate a suggested translation of the Maori equivalent the Muriwhenua tribunal severed the words as follows:

Ko te Kuini o Ingarani ka wakarite ka wakaae ...
The Queen of England assures and agrees [to give]
ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani ...
to the chiefs, the sub-tribes and all the
[Maori] people of New Zealand
te tino rangatiratanga ...
the full authority
o o ratou wenua ...
of their lands
o ratou kainga ...
those places where their fires burn
me o ratou taonga katoa.
and all those things important to them.{FNREF|0-86472-103-X|4.2.2|1}

The Muriwhenua tribunal notes that estates, forests and fisheries are not specifically mentioned but "taonga" covers them all. And further, that while exclusivity is not expressed it is inherent in both "taonga" and "rangatiratanga". The qualification "so

long as it is their wish and desire to retain the same in their possession" is implied. The Muriwhenua report continues:

'Kainga' is new and stresses that occupancy continues. It derives from 'ahi kaa', the fire that is always alight, for by use of the right wood, though burnt and buried it is used to rekindle flame.

Mainly we are introduced to a concept of full chieftainship over lands and all things important or highly prized.

We prefer "full authority" to the literal full chieftainship. Essentially, Maori authority is personified in chiefs but derives from the people. Maori understood 'rangatiratanga' to mean 'authority'. Accordingly, when discussing the Treaty, Maori often substituted mana which includes authority but has also a more powerful meaning ....

Similarly, "those things important to them" is used to emphasise that something more than tangibles (or taputapu) was intended.{FNREF|0-86472-103-X|4.2.2|2}

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4.3 Contexts

4.3. Contexts

English text

4.3.1 The Muriwhenua tribunal gave detailed consideration to the English law of fisheries since it was assumed by the Crown from an early stage of settlement in New Zealand that the English law, not the Treaty of Waitangi, governed the rights of both Maori and non-Maori to sea fishing. It came to the conclusion:

first, that the Crown's presumptive title to the foreshore was capable of being displaced by, or made subject to customary rights on proof of long term user. Secondly, however, there is no strong evidence that anyone held some special right to fish the open seas by virtue of long term user, but only by actual Crown grant. Thirdly, the private foreshore fisheries were regarded as properties. Fourthly, there was a Court procedure whereby people's claims to private fisheries could be upheld as against the Crown.{FNREF|0-86472-103-X|4.3.1|3}

In the English text of the Treaty of Waitangi, Maori fisheries are called properties too. This led the Muriwhenua tribunal to consider whether the drafter of the English text might have had English foreshore fisheries in mind. On the evidence it concluded, as does this tribunal, that that was not so. The Treaty was prepared in New Zealand and the article on fisheries was drafted by James Busby who was fully aware of Maori fishing activity. He had lived in the Bay of Islands as British Resident since 1833. He well knew that every acre of land in New Zealand was appropriated among the different tribes; that Maori fishing was practised well beyond the foreshore and that Maori would not have understood the more limited arrangements of English law.{FNREF|0-86472-103-X|4.3.1|4} We concur in the view of the Muriwhenua tribunal that the English experience places no gloss on the Treaty's plain words and that the text was drafted with the New Zealand context in mind. We turn then to the Maori version.

Maori text

4.3.2 Under this heading the Muriwhenua tribunal gave a full and informative exposition of the significance of such key Treaty words as 'taonga' and 'tino rangatiratanga' in the context of Maori cultural values with particular reference to fisheries. We set this out in its entirety and subject to some additional observations, adopt it as our own:

(a) There are obvious distortions when Maori concepts are translated in Western terms. It must be understood that the division of properties was less important to Maori than the rules that governed their user. These criteria underline Maori thinking

(i) A reverence for the total creation as one whole;

(ii) A sense of kinship with fellow beings;

(iii) A sacred regard for the whole of nature and its resources as being gifts from the gods;

(iv) A sense of responsibility for these gifts as the appointed stewards, guardians and rangatira;

(v) A distinctive economic ethic of reciprocity; and

(vi) A sense of commitment to safeguard all of nature's resources (taonga) for the future generations.

To meet their responsibilities for these taonga, an effective form of control operated. It ensured that both supply and demand were kept in proper balance, and conserved resources for future needs.

Maori extended their deep sense of spirituality to the whole of creation. In their myths and legends they acknowledged gods and other beings who bequeathed all of nature's resources to them. There was a system of tapu rules which combined with the Maori belief in departmental gods as having an overall responsibility for nature's resources served effectively to protect those resources from improper exploitation and the avarice of man. To disregard or to disobey any of the rules of tapu was to court calamity and disaster.

To the pre-European Maori, creation was one total entity - land, sea and sky were all part of their united environment, all having a spiritual source. It was by divine favour that the fruits from these resources became theirs to use. The first fruits taken were invariably offered back to the gods.

In Maori terms these resources were possessed. Before European contact Maori had no system of buying and selling. Rather their economy was based principally on the giving of gifts upon which were attached the obligations of reciprocity.

All resources were 'taonga', or something of value, derived from gods. In a very special way Maori were aware that their possession was on behalf of someone else in the future. Their myths and legends support a holistic view not only of creation but of time and of peoples.

Maori involvement with fish and fisheries is as ancient as the creation. The North Island is a fish in their legends.

Tangaroa is the God of the fish, allowing Maori to gather fish after the appropriate ritual and karakia have been observed. He is known throughout Polynesia. Fish were

referred to as "the progeny of Tangaroa" (Buck 1949:458). There was absolutely no way a sale or a purchase could have been negotiated under Maori law.

Taonga were either gifted or wrested, never sold. To buy and sell was an entirely western practice and when finally Maori engaged in buying and selling, they were behaving in a Western way within the colonial design and system. In the western pattern they sold only what was listed on the English bill of sale, no more, no less. When Te Kawau said "the land I sold, the sea I did not sell" he was making a genuine un-Maori statement backed by English documentation and was acting in an un-Maori way in order to comply with an un-Maori situation .... In their own cultural terms they would have known that access to the fisheries was gained from Tangaroa in return for the observance of the appropriate rites.

(b) To understand the significance of such key Treaty words as 'taonga' and 'tino rangatiratanga' each must be seen within the context of Maori cultural values. In the Maori idiom 'taonga' in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift-exchange, and is a part of the complex relationship between Maori and their ancestral lands and waters. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.

This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.

The Maori 'taonga' in terms of fisheries has a depth and breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future which colours their thinking, attitude and behaviour towards their fisheries.

The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or 'belonging', but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a 'hurt' to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.

The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.

This vision provided the mauri (life-force) which ensured the continued survival of the iwi Maori. Maori fisheries include, but are not limited to a narrow physical view

of fisheries, fish, fishing grounds, fishing methods and the sale of those resources, for monetary gain; but they also embrace much deeper dimensions in the Maori mind, as referred to in evidence by Miraka Szaszy in the context of spiritual guardianship ....

(c) "Te tino rangatiratanga o o ratou taonga" tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources.

[This tribunal would add a fourth main element as being the creation of the necessary conditions for the survival of the species.]

In the Maori text authority is represented in rangatira, or chiefs who led by virtue of their mana, or personal and spiritual prowess. It was usual for Maori to personalise authority in that way, so that the one word 'mana' applies to both temporal authority and personal attributes.

Accordingly it would be said that a certain chief held the mana of a particular place, or that the authority over tribal seas was vested in a specified person. ... R H Matthews described the position at Rangaunu in terms of the usual Maori idiom.

At the time I am speaking of [1857], the mana or authority over the kopua (the deep) was solely exercised by Popata te Waha, who had inherited it from his ancestors ... Popata te Waha's mana over the kopua was acknowledged by all the surrounding tribes.

The petition of Arama Karaka of 1879 ... shows that Arama saw Maori as having mana over "deep-sea fisheries".

'Mana' is the more usual Maori word for 'authority'. It is likely that Rev Henry Williams avoided using the word in the Treaty because of its particular connotations (see Manukau Report at 8.3). The missionaries were rarely keen on the word, for mana is said to have been inherited from heathen Maori gods. Nonetheless in debating the Treaty in 1879, it was 'mana' that Maori consistently used to describe that which they thought the Treaty had reserved ....

(d) Accordingly, the Maori order related primarily to how resources were used, rather than to how they were owned, and human leadership was combined with spiritual beliefs for the maintenance of control. It does not follow that there was no concept of private rights. There is no doubt that particular subgroups had special use rights of various places and resource areas, and that areas of sea were as much their properties as cultivations on land .... But they did not own them; they stayed in the bloodline; they were not transferable; and all were subject to the overright of the tribe.

Again it is necessary to understand that while particular areas of the land and sea were defined, and prior use rights were apportioned, the key to Maori ownership is not survey definitions but kinship. People moved about the resource areas and had use rights in many places based on kinship or marriage.{FNREF|0-86472-103-X|4.3.2|5}

4.3.3 The Muriwhenua report translated 'te tino rangatiratanga' as 'the full authority'. In paragraph (c) of the preceding passage reference is made to the need for the exercise of authority to recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. We believe that an extremely important element in rangatiratanga is trusteeship. This implies a relationship between the rangatira as trustee and his or her kin group - the trustee's beneficiaries. So the kin group is a closed definable group. In general terms the function of the rangatira as trustee is to sustain the group of beneficiaries - whanau, hapu, iwi - by any means available. The means are the group's estate both material and non-material. Rangatiratanga is the reciprocal relationship between the trustees of a kin community and the beneficiaries and the community's estate provides the means for exercising rangatiratanga. It is people specific and territory specific. We cannot talk about rangatiratanga in a vacuum.

Tribal territories were generally well defined and acknowledged between tribes. Each tribe had complete dominion over the land and foreshore - mana whenua - and over such part of the sea as they exercised mana moana. As between tribes, consent had to be obtained to enter the land or fisheries of others. Tribal wars were caused by invasion of exclusive rights. Through the tribe the rangatira exercises the autonomy of the tribe. Each tribe has its own rangatiratanga which could be called tribal sovereignty. In the context of the Treaty, rangatiratanga was to be exercised in a similar way to that of local bodies who may be said to have a form of limited self-government, which is of course subject always to the sovereignty of the Crown, that is, of the nation.

While rangatiratanga is best defined in its own context, there are some principles of general application. The point of reference for those principles is the relationship between the people and their gods and between the people and their resources which are all sourced from their gods. Rangatiratanga operates within the kin relationship between these concepts - gods, people, resources. With regard to fisheries the reference point is Tangaroa. There are no limitations to the bounty of Tangaroa except respect for the resource and sustainability of the resource. Rangatiratanga includes management and control of the resource and reciprocal obligations between those who actually harvest the resource.

Some legal perspectives of the Maori context

4.3.4 Difficulties arise in expressing Maori concepts in British legal language. For instance in paragraph (d) of the lengthy passage quoted in 4.3.2 the Muriwhenua tribunal emphasised that the Maori order related primarily to how and by whom resources were used, rather than to how they were owned, and human leadership was combined with spiritual beliefs for the maintenance of control. Particular sub-groups had special use rights of various places and resource areas, and areas of the sea were as much their property as cultivations on land. But they did not own them, they stayed

in the descent group; they were not transferable, and all were subject to the oversight of the tribe.

As we have earlier indicated a tribe wishing to enter the land or foreshore of another tribe in peace was obliged to obtain consent of the other tribe. The Muriwhenua report, after citing from a Maori Land Court decision in 1957 and the adoption of certain passages from the decision by the High Court in Keepa v Inspector of Fisheries [1965] NZLR 322, 328 cited Mr Justice Hardie Boys as saying:

One knows from history that it was the invasion by one tribe of another tribe's exclusive rights that led to tribal wars. The appellants support their claim by evidence that, even as between these two tribes, consent had to be obtained by one to enter the part of the foreshore in the DOMINION of the other.(emphasis added){FNREF|0-86472-103-X|4.3.4|6}

The Muriwhenua tribunal went on to point out that:

The missionaries who translated the Bible also saw rangatiratanga in these terms. In the Book of Genesis, chapter 1, verse 26, God said "Let us make man in our own likeness" and "Let them have dominion over the fish of the sea, etc". The Maori translation of this verse is "Kia hanga tatau, te tangata. Kia rite kia tatau" and "kia waiho ratou, hei rangatira mo nga ika".

In this example, 'rangatira' equates with 'dominion'.{FNREF|0-86472-103-X|4.3.4|7}

We agree that the judicial findings correctly locate 'dominion' as the nearest British cultural equivalent to the tribal overright. In that same context, the tribal resources were also properties that were owned.

The Muriwhenua tribunal rejected, as does this tribunal, a suggestion by the Crown and the fishing industry that rangatiratanga denoted something less than ownership.{FNREF|0-86472-103-X|4.3.4|8} It was suggested that stewardship was more significant in the mores of Maori society. But neither "rangatiratanga" nor "mana" excludes ownership. Stewardship was an aspect of the Maori way, but not one that meant tribal resources were automatically shared with all comers. Indeed, it was the essential part of rangatira stewardship or trusteeship that they did not permit an intrusion at will. We endorse the conclusion of the Muriwhenua tribunal that:

Maori ranked those properties much higher than mere commodities, holding them with profound spiritual regard for a vast family, of which many are dead, few are living, and countless are still unborn. That cultural peculiarity cannot be used to deny ownership, however, or to imply that because of it, the resources must be shared.

In more simplistic terms it can be said that, 'manamoana' (authority over the seas) applied in the same idiomatic form to land-mana whenua-and yet it has never been suggested that Maori land rights amounted to less than ownership when expressed in English terms.{FNREF|0-86472-103-X|4.3.4|9}

This relatively brief discussion and the much larger section in the Muriwhenua report on which it is based, serve to highlight the problems and potential pitfalls in

attempting to formulate Maori concepts such as rangatiratanga and taonga in the form of British legal constructs. But we are left in no doubt that Ngai Tahu, along with all other Maori iwi, in British legal language owned their tribal land and sea fisheries.

We turn next to a discussion of the nature and extent of the Ngai Tahu sea fisheries in the light of this discussion and the preceding chapter 3.

Waitangi Tribunal, Department of Justice, Wellington.

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4.4 "Their Fisheries"

4.4. "Their Fisheries"

4.4.1 The reference to "their fisheries" in the English version of the Treaty occasioned considerable debate during the course of this inquiry over what exactly the drafters of the Treaty had in mind. The Muriwhenua tribunal found that "their fisheries" could be defined as:

their activity and business of fishing, and that must necessarily include the fish that they caught, the places where they caught them, and the right to fish.

'Taonga' ... includes all of these things, and had other dimensions too.{FNREF|0-86472-103-X|4.4.1|10}

It further found that Maori fisheries could not be limited to site specific grounds, favourite fishing places or a mere right of access to the sea.{FNREF|0-86472-103-X|4.4.1|11} The tribunal in that claim based these findings on searches of four dictionaries which provided a variety of meanings, and applied those meanings in the light of the particular experience of the New Zealand situation.

This definition was challenged during the course of hearings into this claim by Tim Castle, counsel for the fishing industry. Counsel called evidence from Professor Ian Gordon, a retired professor of English from Victoria University of Wellington and a noted linguist. In Professor Gordon's view the Muriwhenua tribunal had erred in relying on dictionaries which did not put the definition of "fisheries" in the correct historical context. He argued that the meaning of "their fisheries" could only be accurately determined by examining dictionaries which were contemporaneous with the Treaty. While three of the four dictionaries examined by the Tribunal provided definitions which post-dated 1840, one, the Oxford English Dictionary of Historical Principles 1933, provided an historical definition which predated 1840. This source defined fisheries as "the business, occupation or industry of catching fish or of taking other products of the sea".

The same dictionary indicates the following definitions for "business":

"The state of being busily engaged in anything; industry, diligence"; "Diligent labour, exertion, pains"; "The object of anxiety or serious effort"; "In a general sense: action which occupies time, demands attention and labour; especially, serious occupation, work, as opposed to pleasure or recreation". (Z43:5)

Occupation is self-explanatory. The following definitions are included for "industry":

"Diligence or assiduity in the performance of any task, or in any effort; close and steady application to the business in hand; exertion, effort"; "Systematic work or labour; habitual employment in some useful work ...." (Z43:5)

We agree with the observation of Dr Loveridge, a Crown witness, that all of these usages point to a broad definition of "fishery" which encompasses non-commercial as well as commercial forms, including fisheries conducted for subsistence and barter (Z43:5).

Using dictionaries from the early nineteenth century, Professor Gordon argued that the definition of "their fisheries" as the business and activity of fishing was inappropriate. He rejected the proposition that British drafters of the Treaty intended the protection of Maori fisheries to include fishing grounds "in the no-man's land of the open sea" (S16:10). Based on his understanding of English definitions of the term fisheries, he concluded that the protection of fisheries in New Zealand could only have meant the protection of fisheries in rivers and lakes surrounded by Maori land and along the shorelines adjacent to those lands.

On the basis of this evidence the fishing industry submitted that a correct definition of "their fisheries", using proper linguistic analysis and contemporaneous evidence, should be "their fishing grounds" (V1:3; S23:2-3).

4.4.2 The Crown, in accepting the definition of "their fisheries" given in the Muriwhenua report, called the evidence of Dr Loveridge (Z43; AA17). Dr Loveridge presented an historical rather than linguistic interpretation of the genesis of the Treaty's provisions. While Professor Gordon's understanding of "fisheries" may have been appropriate in reaching an agreement with British fishers, according to Dr Loveridge the New Zealand situation compelled Hobson to deal on a broader framework more appropriate to the experience of Maori fishers and Maori negotiators. Because the Treaty was not drafted exclusively by Hobson but was significantly enlarged by James Busby, the text of the Treaty can be seen as reflecting local circumstances. Hobson was new to the region, inexperienced in dealing with Maori, and likely to use language untempered by a first hand knowledge of tikanga Maori. Busby on the other hand had been in New Zealand since 1833 (Z43:3, 6). He was the British resident and had become very familiar with iwi at least of the Bay of Islands and probably well beyond. He had also been considering the whole question of aboriginal title to resources within New Zealand. He knew how extensively fisheries were valued by Maori and the extent to which Maori had developed these fisheries to their own needs for self sufficiency and internal trade and how clearly they were regarded by Maori as tribal property. It was Busby who included the reference to fisheries in article 2, as the surviving draft of the Treaty referred to the British resident by Hobson has no reference to fisheries at all (Z43:6-7). There are other substantial differences. The original draft provides little of a property guarantee at all, but emphasises pre-emption:

2d The United Chiefs of New Zealand yield ... to Her Majesty the Queen of England the exclusive right of Preemption over such waste Lands as the Tribes may feel disposed to alienate. (Z43:6)

It was Busby who then produced a much enlarged draft which included all but one word of the final version of article two. He included reference to "full exclusive and undisturbed possession" and it was he who listed "Lands and Estates, Forests Fisheries and other properties". The only subsequent change to Busby's draft of article two was the alteration of "collectively or severally" to "collectively or individually" (Z43:7; X4:8). On the basis of this Crown counsel submitted that:

when Maori signatories were promised "the full exclusive and undisturbed possession of their ... Fisheries" - that is, of any and all fisheries "which they may collectively or individually possess" - the English drafters of the Treaty took into account the manner in which these things would have been defined and understood by Maori. (X4:9, emphasis in original)

The Crown further agreed that Hobson's instructions made it clear that he was to disclaim:

every pretension to seize on the islands of New Zealand, or to govern them as a part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages should be first obtained. (X4:10, emphasis added by Crown counsel){FNREF|0-86472-103-X|4.4.2|12}

From this the Crown concluded that the definition of "their fisheries" which most appropriately takes into account the use of Maori fisheries in New Zealand at 1840 was that applied by the tribunal in its Muriwhenua report.

4.4.3 The Crown has already made statutory use of this definition in the Maori Fisheries Act 1989. The long title of the Act states that its purpose (inter alia) is:

(a) To make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi; and

(b) To facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing.

The Act establishes the Maori Fisheries Commission. Among its principal functions are first, a requirement to facilitate the entry of Maori into, and the development by Maori of, "the business and activity of fishing". Secondly, to grant assistance to any Maori or groups of Maori to enable them to "enter into or to continue in or to develop the business and activity of fishing".{FNREF|0-86472-103-X|4.4.3|13}

It is clear that these functions of the fisheries commission which are concerned to facilitate entry and development of Maori into the business and activity of fishing, are intended to be among the means by which better provision is to be made for the recognition of Maori fishing rights secured by the Treaty of Waitangi. While it may perhaps be going too far to say that this constitutes an express legislative recognition of the Muriwhenua tribunal definition of Maori fisheries it is nonetheless significant that the statute has chosen to employ the same language in the context of Maori Treaty fishing rights.

4.4.4 In answer to a question from the tribunal as to how the fisheries confirmed and guaranteed to Ngai Tahu under article 2 of the Treaty should be defined counsel for the claimants responded:

The fish in the sea off-shore from the manawhenua of the tribe without restriction as to species, depth or seaward boundary. To avoid any possible confusion or ambiguity, those fisheries must include the activity and business of fishing and the potential for development in existing or future fisheries. But that development right in those water[s] is exclusive to Ngai Tahu being the tribe which fished those waters pre-Treaty. Where that right overlaps with the development rights of Chatham Islands and Ngati Kahungunu, the exercise of those rights is a matter to be negotiated between those tribes. (AB1:54)

Therefore, while the claimants incorporate the Muriwhenua tribunal definition of "the activity and business of fishing" they add claims as to the absence of any restriction as to species, depth or seaward boundary, and the potential for development.

4.4.5 We are unable to accept the restricted definition of Maori Treaty fishing rights as referring only to "their fishing grounds" as claimed by the fishing industry. The difficulty with the industry's approach is that it concentrates almost exclusively on what was thought to be in the minds of the English drafters of the Treaty. But even were that approach justified, it fails in our view to take any or adequate account of the input of James Busby. And even more seriously, it fails to take any or adequate account of the Maori understanding of the Crown's guarantee of their tino rangatiratanga over their taonga, one of the most valued of which was their fisheries. As we have seen tino rangatiratanga in relation to fisheries encompasses much more than simply fishing grounds.

4.4.6 We agree with counsel for the Crown that Hobson's instructions that Maori "usages" should be taken into account in drafting the Treaty were addressed in the substantial changes made to Hobson's draft by Busby. Moreover, the use of the term "taonga" in the Maori text of the Treaty would not have given Maori any comprehension that an English text, which almost all did not see and could not have understood, might have significantly reduced their rights to their fisheries on the basis of a narrow definition in accord with principles of common law unknown to Maori. While the English drafters could, through ignorance of Maori fisheries, have had a narrow common law definition in mind, the Crown has convincingly argued that this was not the case. Hobson referred his draft of the Treaty to the British resident, the Crown's agent in New Zealand prior to Hobson's arrival. Busby recommended modifications based on his wide experience of local Maori usage and these recommendation were accepted and incorporated into the Treaty.

4.4.7 Accordingly, we reject the fishing industry's first submission that the Muriwhenua tribunal erred in defining "their fisheries" in the Muriwhenua report as "their business and activity of fishing" instead of "their fishing grounds".

4.4.8 We turn now to the industry's second and alternative submission that:

the definition "their business and activity of fishing", on the reasoning process adopted by the Waitangi Tribunal in the Muriwhenua Fishing Report, is fact-specific

to that case and, because of the important factual discrepancies between the Muriwhenua circumstance and the Ngai Tahu circumstance, should not be applied in the Ngai Tahu claim. (V1:3)

In support of this submission Mr Castle for the fishing industry emphasised a statement by the Muriwhenua tribunal that:

A major finding is that "their fisheries" refers to the business and activity of fishing, IN THE CONTEXT OF THE CASE, and that the Maori business and activity in fishing ought not to have been impinged upon without some prior agreement. In this context, taonga means the same. (V1:8, emphasis added by Mr Castle){FNREF|0-86472-103-X|4.4.8|14}

This passage, said Mr Castle, shows how the tribunal's inquiry moved from consideration of the facts of that case to the meaning and application of the Treaty to those facts. In particular, it was said, the definition of "their fisheries" arrived at was the one appropriate "in the context of the case". Counsel went on to submit that the phrases "their fisheries" or "o ratou taonga" might well have a different meaning and application in relation to a different set of facts providing the facts were materially different. It was Mr Castle's contention that the facts in the Ngai Tahu claim are materially different from those in the Muriwhenua claim (V1:8-9).

Before we discuss Mr Castle's analysis of the evidence in the two cases we should make it clear that in our opinion Mr Castle's submission is tenable only if by a 'material' difference he means a difference in kind and not simply one of degree. We accordingly approach Mr Castle's analysis with this in mind. We also bear in mind the definition of 'business' already referred to above which includes (among other matters):

"The state of being busily engaged in anything", "Diligent labour, exertion ..." and "In a general sense: action which occupies time, demands attention and labour, especially serious occupation, work, as opposed to pleasure or recreation."

We note too, the definition of "activity" in the Concise Oxford Dictionary as follows:

Exertion of energy; state or quality of being active; diligence ... actions, occupations

Mr Castle referred first to various findings in the Muriwhenua report as to the Muriwhenua tribes' use of their fishing resource and then compared these with what he submitted were the facts relating to Ngai Tahu use of their fishing resource. We will consider each of the findings as listed and discussed by Mr Castle in turn. Paragraphs (a) to (f) relate to the Muriwhenua use of their fishing resource.

(a) "Full and extensive use"{FNREF|0-86472-103-X|4.4.8|15}

By contrast Mr Castle submitted that the Ngai Tahu user having regard to the size of the coastline and the relatively small population did not constitute a full and extensive use of the resource. While it appears the Ngai Tahu user of their plentiful resource was not as full as that of the more populous Muriwhenua tribes particularly on the West Coast where few Ngai Tahu lived it was nonetheless widespread on the east and

southern coasts. As our earlier findings indicate, Ngai Tahu certainly made substantial if not extensive use of their fisheries. Obviously had their population been greater, as earlier it had been, their use would have been correspondingly greater. The mere fact that a tribe makes less use of a larger resource than a more densely settled tribe makes of a smaller resource cannot surely result in the one engaging in a business and activity and the other not. Such differences as exist here are no more than differences in degree; they are in no sense critical to the question of whether Ngai Tahu were engaged in the business and activity of fishing. Because the extent of one tribe's fishing is less than that of another does not mean that it cannot constitute the business and activity of fishing. Each instance must be looked at on its own set of facts and not in relation to that of another tribe.

(b) Muriwhenua fishing was said to be "intensive all year round to about 3 miles off-shore".{FNREF|0-86472-103-X|4.4.8|16}

By contrast, Ngai Tahu fished intensively out to about one mile from the shore, reef species being available in the onshore zone the year round and pelagic species being caught between December and May. Understandably, given their greater density of population and perhaps greater dependence on sea fish for their sustenance, the Muriwhenua tribes fished more intensively then did Ngai Tahu. Again, this is simply a matter of degree. This in no way affects the question of whether Ngai Tahu was engaged in the business and activity of fishing. The facts show that Ngai Tahu fished regularly and actively. They were dependent to a significant degree on sea fish for their sustenance, large quantitites being dried for later use over the winter months and also for barter and trading. It was not a mere pastime. It was an essential and almost daily occupation. It was serious and skilled work.

(c) Muriwhenua fishing was "intensive and regular but mainly seasonal" from 3-12 miles off-shore.{FNREF|0-86472-103-X|4.4.8|17}

As we have indicated in the preceding chapter Ngai Tahu fishing beyond a mile or so out to some 12 miles fromthe shore was less frequent. Hapuku was a favourite catch. Fishing out to this distance occurred not only off the main settlements but, during their periodic sojourns, off other parts of the coastline.

Once again and for the same reasons as in (b) the Muriwhenua tribes appear to have fished more extensively out to 12 miles than did Ngai Tahu. Again it is a matter of degree. Fish were plentiful. Ngai Tahu caught all they required.

(d) refers to Muriwhenua tribes fishing "at distances up to 25 miles from shore" and (e) to possibly further out again - a ground 48 miles from shore was described.{FNREF|0-86472-103-X|4.4.8|18}

Ngai Tahu appears to have fished on occasions in a ground some 30 to 60 miles off-shore. Such difference as may exist between the Muriwhenua and Ngai Tahu off-shore fishing relates only to their relative infrequency. Neither ventured out to these distances often.

Counsel for the fishing industry also referred to other characteristics of the Muriwhenua fishing resource (V1:11). Those characterisations in the following

paragraphs (i), (ii) and (iii), Mr Castle agreed applied similarly in the Ngai Tahu circumstances (V1:20):

(i) "The HAPU and tribes of Muriwhenua hold the MANA of the whole of the inner band-ie. out to 12 miles". Likewise we have found that Ngai Tahu held the mana of the sea fisheries out to a distance of at least 12 miles (4.5.7).

(ii) "Their [f]ishing equipment, methods and biological knowledge were highly competent and involved a variety of specialised techniques". The same statement may also be made of Ngai Tahu.

(iii) "[C]atch quantities were small but not when viewed in terms of contemporary population, size and distribution". This is equally true of Ngai Tahu.

(iv) "The common cultural characteristic of the Maori tribes was the paramount dependence upon the products of an aquatic economy".

The Muriwhenua tribunal noted that the lack of comparable inland resources in Muriwhenua made the sea resource more important for them than most others. Their dependence on the sea was greater.

It may have been that the Muriwhenua tribes' dependence on their sea fisheries resources was greater than that of Ngai Tahu. But as we have seen, sea fisheries were a highly important and essential part of the Ngai Tahu diet throughout much of the year. Unlike the climatic conditions experienced by Muriwhenua, those of Ngai Tahu did not allow cultivation or agricultural pursuits in much of Ngai Tahu territory. The great effort put into catching and preserving fish for consumption over the winter months testifies to the central part kai maoana and kai ika played in their daily sustenance. Any difference here is one of degree only.

(e) As far as commercial user of the resource by the Muriwhenua tribes was concerned:

In the decade before the Treaty, Maori fishing generally increased to accommodate a new demand for local non-Maori consumption and for export, as well as to provide money to purchase introduced commodities.

... The Muriwhenua fish trade was limited to visiting boats and the pre-1840 settlements.{FNREF|0-86472-103-X|4.4.8|19}

Mr Castle conceded that "the commercial involvement of Ngai Tahu in supplying settlers and other markets would have been greater than in the far north" (V1:20).

4.4.9 In conclusion Mr Castle submitted that in relation to "their fisheries" and "o ratou taonga" critical factual differences between the Muriwhenua tribes' use of the fishing resource and that of Ngai Tahu means that, in the Ngai Tahu context, the phrases "their fisheries" and "o ratou taonga" do not mean "their business and activity of fishing". But counsel omitted to elaborate on which factual differences were "critical" or in what way they were "critical". It would be extraordinary if the facts relating to the use of the fishing resources in Muriwhenua and Ngai Tahu (or

anywhere else) were identical. They were not. But in fact there is a quite remarkable similarity. Both were dependent on sea fisheries for their sustenance. Both fished close inshore intensively. Both fished out to 12 miles or so less frequently. Both ventured even further on relatively rare occasions. Both were actively and frequently engaged on the serious, indeed essential, work of providing for their daily sustenance and for gift exchange and trade.

4.4.10 Bearing in mind the factual circumstances of the frequent and regular access of Ngai Tahu to their abundant sea fisheries, and bearing in mind also the commonly accepted meaning of "business" and "activity", we are satisfied that Ngai Tahu Treaty fishing rights, that is "their fisheries" refers to THEIR ACTIVITY AND BUSINESS OF FISHING, AND THAT MUST NECESSARILY INCLUDE THE FISH THAT THEY CAUGHT, THE PLACES WHERE THEY CAUGHT THEM, AND THE RIGHT TO FISH. THEY ARE NOT LIMITED TO SITE SPECIFIC GROUNDS, FAVOURITE FISHING PLACES OR A MERE RIGHT OF ACCESS TO THE SEA.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

04 Ngai Tahu Sea Fisheries Treaty Rights at 1840

4.5 The Nature and Extent of Ngai Tahu Sea Fisheries Treaty Rights in 1840

4.5. The Nature and Extent of Ngai Tahu Sea Fisheries Treaty Rights in 1840

4.5.1 In chapter 3 we considered in some detail the evidence from the various parties as to the nature and extent of Ngai Tahu sea fisheries prior to and as at 1840. We reached certain conclusions on this evidence. At the same time we noted that when dealing with events going back many centuries, and at the latest some 150 years ago, it is unrealistic to expect a precise assessment of the factual situation. If our conclusions err we believe they err in the direction of understating rather than overstating the full nature and extent of the Ngai Tahu sea fisheries. Not everything so long ago in the past can be remembered or reconstructed.

In this chapter we have considered Ngai Tahu sea fishing rights under article 2 of the Treaty of Waitangi as at 1840. It now remains for us to state our findings on the nature and extent of such Treaty rights in the light of our conclusions on the evidence discussed in chapter 3.

No seaward boundary?

4.5.2 In an amended claim of 2 June 1987 the claimants indicated that since the issue of Treaty rights to mahinga kai, especially in respect of fisheries, was subjudice in the Muriwhenua claim then proceeding in the Waitangi Tribunal it would be inappropriate to detail it further at that stage. But notice was given that a claim would be pressed for a share in the fisheries, including the commercial fisheries of Te Waipounamu.{FNREF|0-86472-103-X|4.5.2|20}

On 25 September 1987 the claimants filed a further amended fisheries claim. It correctly anticipated that the sea fisheries component of its claim would be dealt with separately pending the outcome of the Muriwhenua claim then before the tribunal. In this amended claim:

- Ngai Tahu claimed sole ownership of the fishery off their tribal coasts out to the 12 mile limit under the Treaty of Waitangi.

- In the light of the Treaty partnership principle Ngai Tahu agreed to grant the Crown a full half share in that fishery including the right to 50% of all ITQ within the 12 mile limit.

- By way of compensation for losses arising from the serious depletion of its sea fishing within the 12 mile limit agreed to accept an allocation of ITQ in the fishery beyond the 12 mile limit, the question of such allocation to be negotiated.

- The amended claim was filed without prejudice to its substance being filed in a more formal way at a later date.{FNREF|0-86472-103-X|4.5.2|21}

4.5.3 The Muriwhenua report is dated 31 May 1988. On 25 June 1988 the claimants filed a further amended claim in respect of fisheries (J7).{FNREF|0-86472-103-X|4.5.3|22} As it is central to this claim before us we annex a copy as appendix 1 of this report. For present purposes we refer to the following salient parts of the amended claim:

- Ngai Tahu own the marine fishery adjacent to their tribal territory. That fishery is their property and has been since time immemorial.

- The geographic extent of their fishery is said to be bounded laterally by perpendicular projection into the sea off their tribal land boundaries with other tribes at the coast at Pari-nui-o-whiti on the east, and at Kahuraki (Kahurangi) on the west, and sweeping southwards around the coast of Te Waipounamu and offshore islands including those to the south of Rakiura.

- No seaward boundary offshore is recognised. Their traditional and customary tribal fishery is not limited by any past or present law or custom of Britain or of the Crown in New Zealand as regarding three, twelve, 200 or any other number of miles offshore, nor the alleged projectile strength of their cannon. They claim the right to go to sea as far as they must, or are able, in order to obtain the fish they require.

- The Ngai Tahu fishery is said to include the right to fish without any interference or restriction whatever by the Crown or by other British subjects or New Zealand residents or by foreign persons.

4.5.4 We pause here before referring to other aspects of the claim. If we correctly understand the Ngai Tahu claim it is that their sea fisheries extend indefinitely seaward on either side of the South Island without limitation within the parameters specified. These parameters we believe would be within the latitudes 40ø and 48ø. Taken literally this would imply that the Ngai Tahu sea fisheries extend without limit around the world within these latitudes. Such a suggestion is clearly untenable and is in conflict with the sea fishing rights of a number of other nations.

The full implications of such a claim need only to be stated for their fatally flawed nature to become apparent. The Maori version of article 2 of the Treaty guaranteed to Ngai Tahu te tino rangatiratanga over their sea fisheries. The Muriwhenua tribunal referred to three main elements embodied in the guarantee of rangatiratanga. First, authority or control, since without it the tribal base is threatened. Secondly, the exercise of that authority must recognise the spiritual source of the taonga; thirdly, the exercise of authority was not only over property but over persons within the kinship group and their access to tribal resources. In addition to these this tribunal has emphasised that an important element in rangatiratanga is trusteeship. But this trusteeship does not operate in a vacuum; it is people and territory specific. Further, a tribe's authority extended over the land and foreshore and over such part of the sea as it exercised manamoana. And, while there are no limits to the bounty of Tangaroa except respect for the resource and sustainability of the resource, rangatiratanga includes management and control of the resource.

4.5.5 Notwithstanding the apparently global nature of its sea fisheries claim, we believe that the claimants have recognised that there must be more defined limits both in terms of people and the sea territory involved. Later in their claim of 25 June 1988 Ngai Tahu recognised "the conservation and management duties inherent in their rights of ownership usage and control of their fishery, for the continuing benefit of themselves and all other citizens of New Zealand" (see appendix 1; J7:3). Clearly such duties of management and control could not extend world-wide whether in 1840 (the period with which we are now concerned) or at present. In speaking of duties of management and control Ngai Tahu is referring to important elements of rangatiratanga. Those duties can only relate to territories, whether on land or sea, over which they can be effectively implemented.

4.5.6 We turn then to examine the extent to which Ngai Tahu in 1840 were able to exercise rangatiratanga over the abundant fisheries which surrounded their tribal rohe. The evidence establishes that Ngai Tahu fished in diminishing degrees of intensity out to 12 miles or so off many parts of the eastern and southern coasts and appreciably less so off the western coast of Te Waipounamu. Some waters, particularly in the west, were inhospitable and were seldom if ever frequented. It is clear however that Ngai Tahu had the capacity to fish out to 12 miles or so from the shore or further had it been necessary and in at least one instance they went appreciably further. There is no evidence that in 1840 any other tribe was challenging their right to fish wherever they chose off their coastline or that, had their fishing been so challenged, they lacked the will or the ability to defend it. It so happened that Ngai Tahu had no need to fish intensively in all available fishing grounds. It is clear they took all the fish they required, and their needs were considerable, within the broad confines of an outer limit of some 12 miles or so from the shore. They fished regularly, in substantial quantities and with discrimination as the archaeological evidence testifies. They were familiar with a wide range of fish as their naming of so many fish demonstrates. We have no hesitation in finding that in 1840 Ngai Tahu exercised effective tino rangatiratanga over the sea fisheries out to a limit of not less than 12 miles from the shore off the whole of the land boundaries of their rohe. They had full exclusive and undisturbed possession of these sea fisheries. They carried on their business and activity of fishing within such parts of these waters as were practicable and suited their convenience and needs. The fact that for various reasons they chose not to fish in some areas in no way diminished their mana and rangatiratanga over their sea fisheries. They took all they needed where and when it suited them to do so.

4.5.7 No doubt on occasions they ventured beyond the 12 miles or so which was normally a sufficient distance for their requirements. We can understand the reluctance of the claimants to admit to any seaward boundary to their fisheries for Tangaroa's bounty did not stop at any arbitrary line. Nor do fish recognise any boundaries. While, on the basis of the evidence before us the only reasonable conclusion is that Ngai Tahu rangatiratanga encompassed the sea fisheries to the approximate limit we have specified, it does not follow that Ngai Tahu could have no future interest in the fisheries beyond 12 miles or so from the shore. In a later chapter we discuss the right of development which is inherent in the Maori sea fishing rights protected by the Treaty. But this critically important issue is best discussed in the light of developments which followed the Treaty and the new nation founded by the Treaty. Accordingly in chapter 10 we consider the nature and extent of Ngai Tahu sea fisheries Treaty rights at the present time having regard to post 1840 developments.

4.5.8 In reaching our conclusions on the nature and extent of Ngai Tahu exclusive sea fishing rights under the Treaty at 1840 we have been mindful of the views of the Crown and the fishing industry. Neither considered the question from a Maori perspective. They concentrated on what they saw to be the factual position with little if any consideration of the nature of Ngai Tahu rangatiratanga over Ngai Tahu fisheries. Thus, after a lengthy discussion on the nature and extent of the fishing at 1840 Mr Carruthers for the Crown said:

All in all it is submitted that the evidence adduced indicates Ngai Tahu fisheries were far less extensive, intensive and controlled in comparison with Muriwhenua. Large expanses of the offshore seas were inhospitable and incapable of use. The evidence is not at all compelling that Ngai Tahu worked the whole of the inshore seas surrounding their tribal territories, let alone the offshore seas. (AB2:35)

Nothing that is said here on behalf of the Crown is inconsistent with the tino rangatiratanga of Ngai Tahu over their sea fisheries out to 12 miles or so from their coastline. We have earlier discussed the comparison with the fishing operations of the Muriwhenua tribes in the context of the fishing industry submissions. We have concluded that while, as is to be expected, the Ngai Tahu sea fisheries differed from those of the Muriwhenua tribes, both were actively and regularly engaged in the business and activity of fishing. Both exercised rangatiratanga over the fisheries in the waters off their respective rohe. Rangatiratanga over these waters did not extend only to those more favoured areas where Ngai Tahu chose to fish. As we have earlier indicated Ngai Tahu had the ability to travel the seas and exploit their resources and to maintain the links of trade and kinship. Cook was met by four canoes off Kaikoura containing 57 men on 15 February 1770. They were at least 12 miles from shore. Ngai Tahu travelled annually to the Titi Islands beyond Rakiura (Stewart Island). They journeyed through the Fouveaux Strait to Fiordland and up and down both the east and west coasts within their rohe and on occasions to the north beyond. They no doubt fished as they journeyed on these various occasions. To find rewarding fishing grounds they doubtless had to travel over less fruitful and on occasions, inhospitable waters. Ngai Tahu rangatiratanga extended to all the waters within their rohe over which they travelled or could travel to engage in fishing. In short, their rangatiratanga encompassed the whole of the sea territory extending 12 miles or so from their lengthy coastline notwithstanding that, for various reasons, not all of it was fished or that some parts were fished more intensively or extensively than others. As we will see in chapter 10 Ngai Tahu Treaty sea fisheries today are more extensive than those at the time of the Treaty.

References

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